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AMENDED IN SENATE MARCH 17, 2003

SENATE BILL**No. 186**

Introduced by Senator Murray

~~(Coauthor: Assembly Member Maldonado)~~

(Principal coauthor: Assembly Member Correa)

*(Coauthors: Assembly Members Bermudez, Maldonado, and
Simitian)*

February 12, 2003

An act to add Article 1.8 (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

SB 186, as amended, Murray. Privacy: unsolicited e-mail advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail the recipient any further unsolicited

documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on these unsolicited e-mailed documents, and prohibits the e-mailing of these unsolicited advertising documents to a person who has requested not to receive any further unsolicited documents. Existing law requires certain unsolicited e-mail advertisements to contain a heading of “ADV:” or “ADV:ADLT.” A violation of the provisions governing advertising is a misdemeanor.

This bill would prohibit ~~an advertiser~~ *a person or entity* located in California from ~~using~~ *initiating or sending, or advertising in* unsolicited commercial e-mail advertisements. The bill would prohibit ~~an advertiser~~ *a person or entity* not located in California from ~~using~~ *initiating or sending, or advertising in* unsolicited commercial e-mail advertisements sent to a California e-mail address if the advertiser knows or should reasonably know that it is a California e-mail address. The bill would provide that if any part of these provisions or their application is held invalid, the invalidity would not affect the other provisions.

This bill would authorize the recipient of a commercial e-mail advertisement transmitted in violation of these prohibitions, the electronic mail service provider, or the Attorney General to bring an action to recover actual damages ~~and~~. *The bill would also authorize these parties to recover* liquidated damages of \$1,000 per transmitted message ~~or up to \$1,000,000 per incident, as defined, whichever is less,~~ subject to reduction by a court for specified reasons. The bill would also provide for an award of *reasonable* attorney’s fees and costs *to a prevailing plaintiff*. The bill would provide that a cause of action in existence prior to its enactment would be governed by the law in effect at the time it arose. The bill would enact other related provisions.

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.



The people of the State of California do enact as follows:

SECTION 1. Article 1.8 (commencing with Section 17529) is added to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, to read:

Article 1.8. Restrictions On Unsolicited Commercial E-mail Advertisers

17529. For the purpose of this article, the following definitions apply:

(a) “Advertiser” means a person or entity that advertises through the use of unsolicited commercial e-mail advertisements.

(b) “California electronic mail address” or “California e-mail address” means any of the following:

(1) An e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state.

(2) An e-mail address ordinarily accessed from a computer located in this state.

(3) An e-mail address furnished to a resident of this state.

(c) “Commercial e-mail advertisement” means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(d) “Direct consent” means that the recipient has expressly consented to receive the message, either in response to a clear and conspicuous request for the consent or at the recipient’s own initiative.

(e) “Domain name” means any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.

(f) “Electronic mail” or “e-mail” means an electronic message that is transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt or is viewed upon transmission or stored for later retrieval. “Electronic mail” or “e-mail” includes electronic messages that are transmitted through a local, regional, or global computer network.

(g) “Electronic mail address” or “e-mail address” means a destination, commonly expressed as a string of characters, to which electronic mail can be sent or delivered. An “electronic mail address” or “e-mail address” may include a user name or mailbox and a reference to an Internet domain.

~~(h) “Incident” means a single transmission of substantially similar content.~~

~~(i)~~

(h) “Electronic mail service provider” means any person, including an Internet service provider, that is an intermediary in sending or receiving electronic mail or that provides to end users of the electronic mail service the ability to send or receive electronic mail.

(i) “Initiate the transmission of a commercial e-mail advertisement” means to transmit or cause to be transmitted a commercial e-mail advertisement or assist in the transmission of a commercial e-mail advertisement by providing electronic mail addresses where the advertisement may be sent, but does not include the routine transmission of the advertisement through the network or system of a telecommunications utility or an electronic mail service provider through its network or system.

(j) “Incident” means a single transmission or delivery by an advertiser or sender to a single recipient or to multiple recipients of unsolicited commercial e-mail containing substantially similar content.

(k) “Internet” has the meaning set forth in paragraph (6) of subdivision (e) of Section 17538.

~~(l)~~

(l) “Preexisting or current business relationship,” as used in connection with the sending of a commercial e-mail advertisement, means that the recipient has made an inquiry, application, purchase, or transaction, with or without consideration, regarding products or services offered by the sender.

~~(k)~~ Commercial e-mail advertisements sent pursuant to the exemption provided for a preexisting or current business relationship shall provide the recipient of the commercial e-mail advertisement with the ability to “opt-out” from receiving the commercial e-mail advertisement by calling a toll-free telephone number or by sending an “unsubscribe” e-mail to the sender of the

1 *commercial e-mail. This opt-out provision does not apply to*
2 *recipients who are receiving free e-mail service.*

3 (m) “Recipient” means the addressee of ~~a~~ *an unsolicited*
4 *commercial e-mail advertisement*. If an addressee of ~~a~~ *an*
5 *unsolicited commercial e-mail advertisement* has one or more
6 e-mail addresses to which ~~a~~ *an unsolicited commercial e-mail*
7 *advertisement* is sent, the addressee shall be deemed to be a
8 separate recipient for each e-mail address to which the
9 *advertisement e-mail* is sent.

10 ~~(l)~~

11 (n) “Routine transmission” means the transmission, routing,
12 relaying, handling, or storing of an electronic mail message
13 through an automatic technical process. “Routine transmission”
14 shall not include the sending, or the knowing participation in the
15 sending, of *unsolicited commercial e-mail*.

16 (o) “Sender” means a person or entity who initiates the
17 transmission of an *unsolicited commercial e-mail* or whose
18 product, service, or Internet Web site is contained in, or
19 accompanied by, an *unsolicited commercial e-mail*.

20 (p) “Unsolicited commercial e-mail advertisement” means a
21 commercial e-mail advertisement sent to a recipient who meets
22 both of the following criteria:

23 (1) The recipient has not provided direct consent to receive the
24 commercial e-mail advertisement.

25 (2) The recipient does not have a preexisting or current
26 business relationship, as defined in subdivision ~~(j)~~ (l), with the
27 advertiser ~~of the realty promoting the lease, sale, rental, gift offer,~~
28 ~~or other disposition of any property, goods, services, or extension~~
29 ~~of credit.~~

30 ~~17529.1. (a) Notwithstanding any other provision of law, if~~
31 ~~an advertiser is located in California, the advertiser shall not~~
32 ~~advertise using an unsolicited commercial e-mail advertisement.~~

33 ~~(b) Notwithstanding any other provision of law, an advertiser~~
34 ~~that is not located in California shall not advertise using an~~
35 ~~unsolicited commercial e-mail advertisement that is sent to a~~
36 ~~California e-mail address if the advertiser knows or should~~
37 ~~reasonably foresee that the e-mail address is a California e-mail~~
38 ~~address.~~

39 *17529.1. Notwithstanding any other provision of law, a*
40 *person or entity may not do either of the following:*

1 (a) Initiate or send an unsolicited commercial e-mail
2 advertisement from California or advertise in an unsolicited
3 commercial e-mail advertisement sent from California.

4 (b) Initiate or send an unsolicited commercial e-mail
5 advertisement to a California electronic mail address, or advertise
6 in an unsolicited commercial e-mail advertisement sent to a
7 California electronic mail address.

8 (c) The provisions of this section are severable. If any provision
9 of this section or its application is held invalid, that invalidity shall
10 not affect any other provision or application that can be given
11 effect without the invalid provision or application.

12 ~~17529.2. (a) In addition to any other remedies provided by~~
13 ~~this article or by other provisions of law, a recipient of an~~
14 ~~unsolicited commercial e-mail advertisement transmitted in~~
15 ~~violation of Section 17529.1, the electronic mail service provider,~~
16 ~~or the Attorney General may bring an action to recover, in addition~~
17 ~~to actual damages, liquidated damages of one thousand dollars~~
18 ~~(\$1,000) for each unsolicited commercial e-mail advertisement~~
19 ~~transmitted in violation of this article, or one million dollars~~
20 ~~(\$1,000,000) per incident, whichever is less. The recipient,~~
21 ~~electronic mail service provider, or Attorney General, if the~~
22 ~~prevailing party, may also recover attorney's fees and costs.~~
23 ~~However, there shall not be a cause of action against an electronic~~
24 ~~mail service provider that transmits the unsolicited commercial~~
25 ~~e-mail advertisement over its computer network.~~

26 17529.2. (a) (1) In addition to any other remedies provided
27 by this article or by any other provisions of law, a recipient of an
28 unsolicited commercial e-mail advertisement transmitted in
29 violation of Section 17529.1, the electronic mail service provider,
30 or the Attorney General may bring an action to recover both of the
31 following:

32 (A) Actual damages.

33 (B) Liquidated damages of one thousand dollars (\$1,000) for
34 each unsolicited commercial e-mail advertisement transmitted in
35 violation of Section 17529.1, up to one million dollars
36 (\$1,000,000) per incident.

37 (2) The recipient, the electronic mail service provider, or the
38 Attorney General, if the prevailing plaintiff, may also recover
39 reasonable attorney's fees and costs.

1 (3) *However, there shall not be a cause of action against an*
2 *electronic mail service provider that is only involved in the routine*
3 *transmission of the unsolicited commercial e-mail advertisement*
4 *over its computer network.*

5 (b) If the court finds that the defendant established and
6 implemented, with due care, practices and procedures reasonably
7 designed to effectively prevent unsolicited commercial e-mail
8 advertisements that are in violation of this article, the court shall
9 reduce the liquidated damages recoverable under subdivision (a)
10 to a maximum of one hundred dollars (\$100) for each unsolicited
11 commercial e-mail advertisement, or a maximum of one hundred
12 thousand dollars (\$100,000) per incident, ~~whichever is less.~~

13 ~~(c) At the request of any party to an action brought pursuant to~~
14 ~~this article, the court, in its discretion, may conduct all legal~~
15 ~~proceedings in a manner as to protect the secrecy and security of~~
16 ~~the computer, computer network, computer data, computer~~
17 ~~program, and computer software involved in order to prevent~~
18 ~~possible reoccurrence of the same or similar act by another person~~
19 ~~and to protect the trade secrets of any party.~~

20 ~~17229.3. Nothing in this article shall be construed to have any~~
21 ~~effect on the lawfulness or unlawfulness, under any other~~
22 ~~provision of law, of the adoption, implementation, or enforcement~~
23 ~~by a~~

24 *17529.3. Nothing in this article shall be construed to limit or*
25 *restrict the adoption, implementation, or enforcement by a*
26 *provider of Internet access service of a policy of declining to*
27 *transmit, receive, route, relay, handle, or store certain types of*
28 *electronic mail messages.*

29 *17529.4. (a) It is unlawful for any person or entity to collect*
30 *electronic mail addresses posted on the Internet if the purpose of*
31 *the collection is for the electronic mail addresses to be used by a*
32 *sender to do either of the following:*

33 *(1) Initiate or send an unsolicited commercial e-mail*
34 *advertisement from California, or advertise in an unsolicited*
35 *commercial e-mail advertisement sent from California.*

36 *(2) Initiate or send an unsolicited commercial e-mail*
37 *advertisement to a California electronic mail address, or advertise*
38 *in an unsolicited commercial e-mail advertisement sent to*
39 *California electronic mail address.*

1 **(b)** *It is unlawful for any person or entity to use an electronic*
2 *mail address obtained by using automated means based on a*
3 *combination of names, letters, or numbers to do either of the*
4 *following:*

5 **(1)** *Initiate or send an unsolicited commercial e-mail*
6 *advertisement from California, or advertise in an unsolicited*
7 *commercial e-mail advertisement sent from California.*

8 **(2)** *Initiate or send an unsolicited commercial e-mail*
9 *advertisement to a California electronic mail address, or advertise*
10 *in an unsolicited commercial e-mail advertisement sent to a*
11 *California electronic mail address.*

12 **(c)** *It is unlawful for any person to use scripts or other*
13 *automated means to register for multiple electronic mail accounts*
14 *from which to do, or to enable another person to do, either of the*
15 *following:*

16 **(1)** *Initiate or send an unsolicited commercial e-mail*
17 *advertisement from California, or advertise in an unsolicited*
18 *commercial e-mail advertisement sent from California.*

19 **(2)** *Initiate or send an unsolicited commercial e-mail*
20 *advertisement to a California electronic mail address, or advertise*
21 *in an unsolicited commercial e-mail advertisement sent to a*
22 *California electronic mail address.*

23 **17529.5.** **(a)** *It is unlawful for any person or entity to*
24 *advertise using an unsolicited commercial e-mail advertisement*
25 *either sent from California or sent to a California electronic mail*
26 *address if the advertiser knows or should reasonably foresee that*
27 *the e-mail address is a California e-mail address under any of the*
28 *following circumstances:*

29 **(1)** *The commercial e-mail advertisement contains or is*
30 *accompanied by a third party's domain name without the*
31 *permission of the third party.*

32 **(2)** *The commercial e-mail advertisement contains or is*
33 *accompanied by falsified, misrepresented, obscured, or forged*
34 *header information.*

35 **(3)** *The commercial e-mail advertisement has a subject line*
36 *that a person knows would be likely to mislead a recipient, acting*
37 *reasonably under the circumstances, about a material fact*
38 *regarding the contents or subject matter of the message.*

39 **SEC. 2.** *A cause of action that is in existence before the*
40 *effective date of this act shall not be affected by this act, but shall*

1 instead be governed by the law that was in effect at the time the
2 cause of action arose.

3 SEC. 3. No reimbursement is required by this act pursuant to
4 Section 6 of Article XIII B of the California Constitution because
5 the only costs that may be incurred by a local agency or school
6 district will be incurred because this act creates a new crime or
7 infraction, eliminates a crime or infraction, or changes the penalty
8 for a crime or infraction, within the meaning of Section 17556 of
9 the Government Code, or changes the definition of a crime within
10 the meaning of Section 6 of Article XIII B of the California
11 Constitution.

